

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

NO: D 202 CV 2013 2757

ROSE GRIEGO & KIMBERLY KIEL, et al.,

Plaintiffs,

v.

MAGGIE TOULOUSE OLIVER, et al.,

Defendants.

ENDORSED
FILED IN MY OFFICE THIS

AUG 26 2013

Amy T. Bernalillo
CLERK DISTRICT COURT

DECLARATORY JUDGMENT, INJUNCTION, AND
PEREMPTORY WRIT OF MANDAMUS

THIS MATTER having come before the Court upon the Second Amended Complaint for Declaratory and Injunctive Relief; the Court having reviewed the entire file; the Court having convened a hearing in open Court on August 26, 2013; and the Court being sufficiently advised:

THE COURT FINDS:

1. There is jurisdiction over the parties and the subject matter.
2. The material issues of fact herein are not in dispute. Plaintiffs are same sex couples who have shared lengthy committed relationships. Having made these deep personal and social commitments, they wish to enter into the state-sanctioned contract of marriage. Defendants are, respectively, the County Clerks of Bernalillo County, New Mexico, and Santa Fe County, New Mexico. The Court further adopts the parties' stipulated facts as set forth in open court.
3. In order to enter into the state-sanctioned contract of marriage, any couple must obtain a Marriage License from a county clerk. Sec. 40-1-1, *et seq.*, NMSA. Defendants are charged with the clear and unambiguous duty to provide Marriage Licenses to qualified couples upon application. Sec. 41-1-10, NMSA. Plaintiffs, and those similarly situated throughout New

Mexico, are otherwise qualified to obtain a marriage license and to enter into the contract of marriage [Section 40-1-1, 40-1-6, and 40-1-7, NMSA] and have either already been denied a Marriage License by Defendants or who will, to a certainty, be denied a Marriage License by Defendants on the basis of their same sex orientation.

4. An “actual controversy” exists between the parties. Section 44-6-1, *et seq.*, NMSA.
5. A specific prohibition of same sex marriage does not exist in Section 40-1-1 through 40-1-20, NMSA, although the statutory scheme does specifically prohibit marriage between minors without consent of their parents or court order, incestuous marriage, and marriage between those lacking contractual capacity.

6. Section 40-1-10, NMSA, establishes the necessity for a marriage license and states:

Each *couple* desiring to marry in New Mexico shall obtain a license from a county clerk...

(emphasis added)

but these statutes do not define or limit the definition of “couple” to a heterosexual pair of contractually capable people nor exclude those of same sex orientation from that term.

7. It is arguable that the use of both gender neutral and gender specific terms in our laws on “Domestic Affairs,” Section 40-1-1 through 40-15-4 NMSA supports the conclusion that New Mexico statutes do not allow same sex marriages; e.g., *Shields v. Madigan*, 783 N.Y.S.2d 270 (N.Y. Sup. Ct. 2004); *Lewis v. Harris*, 908 A.2d 196 (NJ 2006); *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). And it is also arguable that our Territorial Legislature did not even consider same sex marriage when it established the statutory scheme in 1862. From this, some might argue that Defendants are prohibited from issuing Marriage Licenses to same sex couples or, at least, that there is no clear, non-discretionary duty to do so. See, *State of New Mexico's Response to Verified Petition for Writ of Mandamus* 8/12/13 Supreme Court # 34227.

8. It is, however, beyond argument that the People of the State of New Mexico considered, and spoke clearly to ensure “equality of rights under the law” in 1972 by adoption of *Article II, Section 18, Constitution of New Mexico*. Article II, Section 18 provides:

No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. *Equality of rights under the law shall not be denied on account of the sex of any person.*

(emphasis added)

9. Accordingly, whether or not our statutory scheme in Section 40-1-1, *et seq.*, does, or does not, allow same sex marriage is of little consequence to the outcome of this litigation because the voice of New Mexicans in adopting Art. II, Section 18 in 1972 clearly prohibits such discrimination against same sex applicants and the Defendants’ clear, non-discretionary duty to issue a license to “each couple” otherwise qualified stands clearly and inexorably through all the rhetoric.

10. Implying conditions of sexual orientation on one’s right to enter civil contracts such as marriage is a violation of Article II, Section 18’s mandate that “equality of rights shall not be denied on account of the sex of any person.”

11. Implying conditions of sexual orientation on one’s right to enter civil contracts such as marriage is a violation of Article II, Sections 18’s mandate that “no person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws.”

12. Whether based in statute, or Constitutional protections, Defendants have a non-discretionary duty to issue a Marriage License to “each couple” otherwise qualified upon application for same and no valid excuse for not performing that duty has been asserted.

13. Gay and Lesbian citizens of New Mexico have endured a long history of discrimination. See, Breen v. Carlsbad Municipal Schools, 2005 NMSC 028. Denial of the right to marry continues this unfortunate, intolerable pattern and establishes irreparable injury on Plaintiffs' part. *Loving v. Virginia*, 388 U.S. 1 (1967). *U.S. v. Windsor*, (U.S. Supreme Court June 26 2013; see, www.supremecourt.gov/opinions/12pdf/12-307_6j37pdf.)

14. There is a substantial public interest in vindicating the rights of all citizens under the law and in preventing the ongoing violation of our constitutional rights. *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012); *Herrera v. Santa Fe Public Schools*, 792 F. Supp.2d 11744 (DC N.M. 2011). There is no benefit to the parties or the public interest in having this matter progress through a lengthy path of litigation while basic constitutional rights are compromised or denied on a daily basis. Accordingly, the Court finds Plaintiffs have established both that they face imminent and irreparable injury and lack a speedy or adequate remedy at law.

15. The grant of the relief sought by Plaintiffs in this matter would have little or no impact upon Defendants Oliver and/or Salazar. They would still function in accordance with their duties and the relief sought would have little, or no, administrative or economic impact on the operation of their offices.

16. For the reasons set forth above, the operative facts being undisputed, Plaintiffs have demonstrated a significant likelihood of success on the merits of their claim.

17. To the extent not previously set forth, the allegations of the Second Amended Complaint filed August 16, 2013, are incorporated herein. A true copy thereof is attached hereto.

18. It is appropriate to enjoin and restrain Defendants from refusing to issue Marriage Licenses to same sex couples on the basis of their sexual orientation or gender.

19. It is appropriate to issue this Peremptory Writ of Mandamus requiring Defendants, and each of them, to perform their non-discretionary statutory duty to issue a Marriage License to “each couple” otherwise qualified who applies for same without regard to their sexual orientation or gender.

WHEREFORE, it is Ordered:

Declaratory Judgment

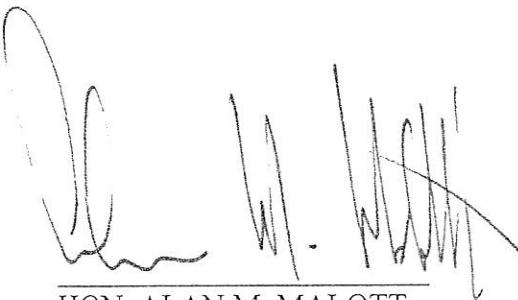
1. Section 40-1-1, *et seq.*, NMSA does not preclude nor prohibit issuance of a Marriage License to otherwise qualified couples on the basis of sexual orientation or the gender of its members.
2. To the extent Section 40-1-1, NMSA, may be read to prohibit issuance of a Marriage License to otherwise qualified same sex couples, those prohibitions are unconstitutional and unenforceable under Article II, Section 18, Constitution of New Mexico.

Writ of Mandamus

3. Immediately upon receipt of this Writ, Defendants Oliver and Salazar, as the County Clerks of Bernalillo County and Santa Fe County, New Mexico, respectively, shall comply with and shall perform their non-discretionary statutory duty to issue a Marriage License upon application from “each couple” otherwise qualified without regard to the couple’s sexual orientation or the gender of its members.

Injunctive Relief

4. Defendants Oliver and Salazar, and each of them, are hereby enjoined and restrained from refusing to issue a Marriage License to "each couple" otherwise qualified who applies for same on the basis of the couple's sexual orientation or the gender of its members.

A handwritten signature in black ink, appearing to read "HON. ALAN M. MALOTT". The signature is fluid and cursive, with a large, stylized initial 'H' on the left and 'ALAN M. MALOTT' following it.

Dated: 8/26/13

Copies of the foregoing were hand delivered to all counsel of record in open court on August 26, 2013.

FILED IN MY OFFICE
DISTRICT COURT CLERK
8/16/2013 10:47:17 AM
GREGORY T. IRELAND

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

Ann Hart

ROSE GRIEGO and KIMBERLY KIEL;
MIRIAM RAND and ONA LARA PORTER;
A.D. JOPLIN and GREG GOMEZ;
THERESE COUNCILOR and TANYA STRUBLE;
MONICA LEAMING and CECILIA TAULBEE; and
JEN ROPER and ANGELIQUE NEUMAN,

Plaintiffs,

v.

No. D-202-CV-2013-02757

MAGGIE TOULOUSE OLIVER, in her
official capacity as Clerk of Bernalillo County;
GERALDINE SALAZAR, in her official capacity
as Clerk of Santa Fe County; and
the STATE OF NEW MEXICO,
Defendants.

**SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE
RELIEF**

INTRODUCTION

1. Plaintiffs are committed same-sex couples who seek the freedom to marry in New Mexico. Each Plaintiff couple has committed to build a life and a home together and to share together as a family the joys and hardships that life may bring them. Each of the Plaintiff couples are, and have been for many years, bound to each other by personal commitment and shared responsibility for the happiness, health and well being of one another and, in some cases, their children and other family members. For any different-sex couple that has made such a weighty and enduring commitment, New Mexico provides a legal institution—civil marriage—that honors and supports their bond in countless intangible and tangible ways. Indeed, the institution of civil marriage exists for the very purpose of recognizing such personal and public commitments of two people to each other. But, unlike other couples who have made a similar commitment to one another, New Mexico denies civil marriage to these Plaintiffs for the sole

reason that the members of these couples are persons of the same sex. Each Plaintiff has been denied the freedom to marry the person she or he loves, and this denial violates Plaintiffs' fundamental rights and liberties under the New Mexico Constitution.

2. Plaintiffs seek a declaration that it is unlawful to deny same-sex couples the freedom to marry on the basis of sex or sexual orientation because such denial deprives them of fundamental rights and liberties, as alleged herein, and otherwise violates the New Mexico Constitution.

3. Plaintiffs seek injunctive relief: (a) that Defendant Maggie Toulouse Oliver, in her official capacity as Bernalillo County Clerk ("Bernalillo County Clerk") and Defendant Geraldine Salazar, in her official capacity as Santa Fe County Clerk ("Santa Fe County Clerk") (or collectively, "Clerks") and Defendant the State of New Mexico ("the State"), (or collectively, "Defendants"), prescribe and furnish forms for the application for license to marry, the license to marry, and the marriage certificate that do not discriminate on the basis of sex or sexual orientation; (b) that Defendants implement and enforce all aspects of the state's marriage law, NMSA 1978, Chapter 40, Article I, without discriminating on the basis of sex or sexual orientation, including without limitation that they take all steps necessary, including the preparation and issuance of detailed instructions as may be required, to procure the uniform observance of NMSA 1978, Chapter 40, Article I, without discrimination on the basis of sex or sexual orientation; and (c) requiring Defendants to treat Plaintiffs, once married in conformance with the licenses issued by the Clerks as prayed for herein, equally with all other married couples under the Constitution and laws of New Mexico.

JURISDICTION AND VENUE

4. This Court has jurisdiction of the subject matter of this action pursuant to the New Mexico Constitution, Art. VI § 13, and NMSA 1978 § 44-6-1 et seq. (“the Declaratory Judgment Act”). This Court has personal jurisdiction over Plaintiffs and Defendants.

5. Venue is proper in this Court pursuant to NMSA 1978 § 38-3-1 because the Bernalillo County Clerk’s offices are located in this county, Plaintiffs Miriam Rand and Ona Lara Porter reside in this county, and because the acts and events giving rise to this Complaint occurred in this county.

PLAINTIFFS

Rose Griego and Kimberly Kiel

6. Plaintiffs Rose Griego (“Rose”), age 47, and Kimberly Kiel (“Kim”), age 44, have maintained an intimate and committed relationship of mutual protection and support for the past eight years. They live together in Santa Fe. Kim is a financial advisor with an independent private practice; Rose is an accountant by trade and owns her own accounting business.

7. Kim and Rose had a traditional commitment ceremony for about 130 guests at the Folk Art Museum in Santa Fe in October of 2010. The ceremony was a momentous occasion for Rose and Kim because it allowed them to have their families and friends bear witness to their declarations of love and commitment to one another, but their joy in celebrating their union was somewhat tempered by the state’s failure to recognize their relationship.

8. Kim and Rose have experienced firsthand the importance even to intimate family members of the legal and social status of marriage. Rose’s sister died a few years ago, and her family did not allow her sister’s boyfriend of ten years to keep any of her belongings after her death or allow him to participate in the decision making surrounding her funeral arrangements. Rose was astonished that her family kept pointing to the couple’s failure to marry in response to

her pleas to allow her sister's long-term boyfriend access to her sister's belongings. Rose does not fault her family, but the experience was instructive, and the couple came to understand the importance of marriage to others: marriage serves as notice that a couple is truly committed, truly family. After the experience, Kim and Rose hired an attorney to put every legal document in place that they could in an attempt prevent a similar situation from happening to one of them.

9. Before they spent the thousands of dollars necessary to duplicate only some of the rights married couples automatically enjoy, Rose was hospitalized. Even though Kim had taken her to the emergency room, the hospital refused to provide Kim with any information about Rose's condition or treatment. It was only after Rose's family arrived that Kim was able to learn Rose's prognosis.

10. Kim has two children from a previous relationship, who are now in college. Her children refer to Rose as their step-mother. Her children recognize the couple's love for and commitment to one another, but Kim and Rose want everyone else to recognize the same. Kim and Rose want to get married, but are unable to do so in New Mexico.

Miriam Rand and Ona Lara Porter

11. Plaintiffs Miriam Rand ("Miriam"), age 63, and Ona Lara Porter ("Ona"), age 66, have maintained an intimate and committed relationship of mutual protection and support for the past twenty-five years. They live together in Albuquerque, New Mexico. Miriam is the owner of Family Matters, LLC. and assists families through the process of adoption, and Ona is the President and CEO of Prosperity Works, a state wide non-profit which focuses on eliminating poverty, building assets for the poor, and challenging racial, gender and class inequities.

12. When they first started dating, Miriam had one daughter from a previous relationship and Ona had two, all of whom are now adults. From the time they combined households, Miriam and Ona loved each other's children as if they were their own. Their

youngest daughter who was just three when they combined families went so far as to go to court to change her surname to Porter-Rand in order to reflect the importance of both of the mothers in her life.

13. Miriam and Ona's middle daughter, Cherif, who is now 41, is debilitated by multiple sclerosis. Miriam and Ona are caring for Cherif, and Ona has adopted Cherif's fourteen-year-old daughter, who herself has cerebral palsy, because Cherif is no longer able to care for her daughter as a result of her disability. Miriam plans to initiate a second parent adoption to ensure that if something were to happen to Ona, their granddaughter would be protected. Although Miriam, Ona, and their granddaughter are a family to all that know them, as individuals, Miriam and Ona do not have automatic legal authority to make important decisions for one another or their child, and they have had to pay significant legal bills to protect their relationship and prove it to others, unlike different-sex couples who can simply marry.

14. Both Miriam's and Ona's mothers died within a year of each other. Before they died, Miriam and Ona cared for each other's aging parents. Even though Miriam and Ona shared the responsibility of their mothers' end of life care, they were faced with restrictive next of kin and family only limitations on visitation and decision making. To facilitate the familial responsibility they had taken on together as a couple, they were forced to pretend to be sisters.

15. Despite the fact that Miriam and Ona cared for each other's mothers as a family, when Miriam's mother died, Ona was not eligible for bereavement leave; and when Ona's mother passed, Miriam was also ineligible.

16. In the year, Miriam and Ona have suffered through the serious illnesses and deaths of several other family members, including Miriam's sister, Miriam's brother-in-law and Ona's brother. The denial of marital rights hampered Miriam and Ona's abilities to visit, to make decisions for, and to care for each other's siblings.

17. Miriam and Ona celebrate their anniversary on the day they signed a mortgage together. On the subject of their anniversary date, they say “it says little about the life of unimaginable love that we have shared for more than 25 years, the children we have raised together, the mothers we have nursed and then buried, the granddaughter we have adopted and whose opportunity for a future of independence, happiness, and productivity is dependent upon our consistent attention to every developmental opportunity that we can manage, or the grown daughter for whom almost total care is essential and ever changing. But that contract is what we have.” What they want, however, is the state’s legal recognition of their deep commitment to one another and their family. Miriam and Ona want to get married, but are unable to do so in New Mexico.

A.D. Joplin and Greg Gomez

18. Plaintiffs Aaron Joplin (“A.D.”), age 34, and Greg Gomez (“Greg”), age 52, have maintained an intimate and committed relationship of mutual protection and support for the past seven years. They live together in Farmington New Mexico. Aaron just earned his bachelor’s degree in business management from New Mexico Highlands University. Greg works as an interior designer.

19. Both A.D. and Greg are very committed to their community. A.D. and Greg are on the Board of Directors of SafeZone at San Juan College, an organization which assists area lesbian, gay, bisexual, transgender or questioning area residents in finding unprejudiced and necessary community support, including unprejudiced counseling and medical care. A.D. is also a peer advocate for a study being conducted by the Behavioral Health Research Center of the Southwest. Greg is on the advisory board for this project.

20. A.D. and Greg do not have any biological children, but they have continued a relationship with a former long-term foster child, now 24 years old, who calls them both Dad.

21. A.D. and Greg have paid to create legal documents to only partially duplicate the rights and privileges different sex married couples are afforded.

22. A.D. and Greg believe that words matter, and they believe that the word partner does not capture the love and devotion that they have for one another. They want to introduce each other as husband to signal the importance of their relationship to everyone else.

23. A.D. and Greg want to get married in New Mexico, but cannot.

Therese Councilor and Tanya Struble

24. Plaintiffs Therese Councilor (“Therese”), age 51, and Tanya Struble (“Tanya”), age 47, have maintained an intimate and committed relationship of mutual protection and support for the past twenty-three years. They live together in Jemez Springs, New Mexico, where they own and operate Giggling Springs, a natural hot mineral water soaking pool. Tanya is also a real estate broker.

25. Therese and Tanya are both very committed to serving their community. Tanya has served on the Village zoning committee, and Therese used to serve on the Jemez Spring City Council. They are also both deeply committed to their business, and proud that their business has been recognized as the Number One attraction in Jemez Springs on Trip Advisor for the past three years.

26. Like many couples, Therese and Tanya have avoided drafting wills and powers of attorney. Although, unlike different-sex married couples, this avoidance could mean that if there were a medical emergency, for example, Tanya would not be the presumed surrogate decision maker for Therese and vice versa or that each would not have automatic right to inheritance as a spouse. Because they want to protect their commitment to one another the best that they can under the circumstances, Therese and Tanya are currently in the process of getting the necessary

paperwork in place in an attempt to duplicate some of the rights automatically afforded to married couples in New Mexico.

27. Therese and Tanya have wanted to get married for many years, and they have recently exchanged commitment rings. They want to get married in New Mexico because it is their home.

Monica Leaming and Cecilia Taulbee

28. Plaintiffs Monica Leaming (“Monica”), age 40, and Cecilia Taulbee (“Cecilia”), age 51, have maintained an intimate and committed relationship of mutual protection and support for the past fifteen years. They live together in Farmington, New Mexico. Monica has taught music in the Farmington public schools for sixteen years and is currently the orchestra director for the high and middle schools. Cecilia is a vice president at a local credit union.

29. Cecilia has three, now adult, daughters from a previous relationship. When Cecilia and Monica first started dating, they were eight, fourteen, and sixteen. Monica welcomed the opportunity to be an important part of their lives as she had always wanted children. The girls have long considered Monica as another parent, and Monica has long considered them her daughters.

30. In 2000, Cecilia and Monica had a ceremony to demonstrate their love and commitment to one another. However, they have not and will not marry in another state where their relationship is recognized because they strongly identify as New Mexicans and want to get married in their home state. Monica was born in Alamogordo, New Mexico, grew up in Colorado, and moved to Farmington after she graduated from college. Cecilia has lived in Farmington her entire life.

31. Despite their commitment to one another, New Mexico does not recognize the importance of Cecilia and Monica’s relationship. Instead of being automatically afforded the

many legal protections that marriage provides, Cecilia and Monica had to pay to create documents to duplicate only some of the rights that married couples enjoy in New Mexico. They hope the documents are sufficient, but worry they are not.

32. Cecilia and Monica want to enjoy the same peace of mind that different-sex couples take for granted. They want to publically demonstrate their love and commitment and to have the state of New Mexico recognize the same. They want to get married, but they cannot in New Mexico.

Jen Roper and Angelique Neuman

33. Plaintiffs Jen Roper (“Jen”), age 44, and Angelique Neuman (“Angelique”), age 45, have maintained an intimate and committed relationship of mutual protection and support for the past 21 years. Jen and Angelique first met as undergraduate students enrolled at New Mexico Tech University, where they both studied materials engineering. Angelique is an engineer at Los Alamos National Laboratories (LANL), where she has been employed since 1996. Jen was employed at LANL from 1997 until 2005, when she resigned to take care of her and Angelique’s children. Until recently, Jen also worked at the Boys & Girls Club in Santa Fe.

34. Twelve years ago, Jen and Angelique adopted three brothers from the custody of Children Youth & Family Department. The boys are now 15, 16, & 18, and Jen and Angelique have dedicated themselves to creating a loving and safe environment for their family. After his May 2013 high school graduation, Jen & Angelique’s eldest son enlisted in the U.S. Army and recently began basic training.

35. Jen and Angelique consider themselves married, and many years ago decided to marry in their home state – New Mexico. Jen and Angelique’s sons are long-time supporters of Jen’s and Angelique’s commitment and efforts to legally marry.

36. On December 19, 2012, Jen was diagnosed with stage 4 glioblastoma – the most aggressive form of brain cancer, and was forced to stop working. Jen underwent surgery on December 24, 2012, which partially removed the tumor. At that time, doctors gave her an 18-month prognosis. Following the surgery, Jen suffered a stroke, which resulted in right-side paralysis, memory loss, difficulty with recall, and vision impairment. Jen has stabilized for the time being, but her physical and mental capabilities will likely continue to deteriorate.

37. Jen and Angelique live in Santa Fe with their sons. Due to her ongoing medical needs, Jen is currently undergoing in-patient treatment at an assisted living facility in Los Alamos, and is unable to travel. Angelique spends hours every day with Jen at the assisted living facility, and the children visit often.

38. Jen and Angelique have long desired to marry, but Jen's illness has created urgency for the couple. The family's struggles with Jen's health and limited future have increased the couple's commitment to each other and have placed in stark relief the importance of recognition for Jen's and Angelique's long-standing relationship. Before Jen dies or before her medical condition leaves her unable to contract, Jen and Angelique want to get married, but they are currently unable to do so in New Mexico, and are unable to travel outside New Mexico to marry elsewhere.

39. Jen and Angelique's inability to marry also inflicts significant practical harms on them and their children, because they are unable to access any of the many benefits that depend on marriage, including those relating to Jen's disability. Although Jen and Angelique's sons receive Social Security disability benefits as a result of Jen's inability to work, Angelique cannot collect spousal benefits because they cannot legally marry.

DEFENDANTS

40. Maggie Toulouse Oliver is sued in her official capacity as Bernalillo County Clerk. As Bernalillo County Clerk, she is a constitutional officer of the State and is responsible for executing the law of the State as it relates to her official duties. N.M. Const. Art. VI, §22; NMSA 1978 §4-40-1 et seq. and *passim*. Among these duties, she is charged with furnishing applicants with the application for license to marry, the license to marry, and the marriage certificate, see NMSA 1978, §§ 40-1-10, to 40-1-19, and more comprehensively, with implementing and enforcing compliance with the marriage eligibility requirements set forth in NMSA 1978, Chapter 40, Article 17.

41. Geraldine Salazar is sued in her official capacity as Santa Fe County Clerk. As Santa Fe County Clerk, she is a constitutional officer of the State and is responsible for executing the law of the State as it relates to her official duties. N.M. Const. Art. VI, §22; NMSA 1978 §4-40-1 et seq. and *passim*. Among these duties, she is charged with furnishing applicants with the application for license to marry, the license to marry, and the marriage certificate, see NMSA 1978, §§ 40-1-10, to 40-1-19, and more comprehensively, with implementing and enforcing compliance with the marriage eligibility requirements set forth in NMSA 1978, Chapter 40, Article 17.

42. The State is sued pursuant to section 13 of the Declaratory Judgment Act, NMSA 1978 § 44-6-1 et seq., which states in pertinent part that “the state of New Mexico...may be sued and declaratory judgment entered when the rights, status or other legal relations of the parties call for a construction of the constitution of the state of New Mexico...or any of the laws of the state of New Mexico...” Since this action calls for the Court to determine that the statutes of New Mexico related to marriage licenses violate the New Mexico Constitution to the extent that they deny the right of Plaintiffs to marry, the State is a proper party.

**PLAINTIFFS' ATTEMPTS TO OBTAIN MARRIAGE LICENSES
IN BERNALILLO COUNTY**

43. On March 21, 2013, Kim and Rose, and Miriam and Ona each appeared at the Bernalillo County Clerk's offices in order to obtain a marriage license. On June 4, 2013, A.D. and Greg, Therese and Tanya, and Monica and Cecilia each appeared at the Bernalillo County Clerk's offices in order to obtain a marriage license. Each Plaintiff couple had proper identification, and was prepared to complete the application and to tender the appropriate fee. Each Plaintiff couple spoke briefly with an employee of the Bernalillo County Clerk's office who is responsible for issuing marriage licenses, and explained that they wanted to apply for a marriage license.

44. For each couple, the Bernalillo County Clerk's employee, acting upon behalf and under the authority of the Bernalillo County Clerk, stated that he or she could not issue them a license because the couple was of the same sex or because of the sexual orientation of each couple.

45. Each Plaintiff individually and each Plaintiff couple is otherwise qualified to contract to marry and to be married under the laws of State of New Mexico in that each Plaintiff is over the age of eighteen, no Plaintiff is part of an existing marriage, and neither Plaintiff couple is related to each other within the degrees of kinship set forth in NMSA 1978 § 40-1-7.

**PLAINTIFFS' ATTEMPTS TO OBTAIN MARRIAGE LICENSES
IN SANTA FE COUNTY**

46. On August 14, 2013, two Plaintiff Couples, Miriam and Ona and Jen and Angelique, appeared at the Santa Fe Clerk's office in order to obtain marriage licenses. They each had proper identification, and were prepared to complete the application and to tender the appropriate fee. They spoke briefly with an employee of the Santa Fe County Clerk's office who

is responsible for issuing marriage licenses, and explained that each Plaintiff Couple wanted to apply for a marriage license.

47. The Santa Fe County Clerk's employee, acting upon behalf and under the authority of the Santa Fe County Clerk, stated that he or she could not issue them marriage licenses because they were of the same sex or because of their sexual orientation.

48. They were otherwise qualified to contract to marry and to be married under the laws of State of New Mexico in that they are over the age of eighteen, are not part of an existing marriage, and are not related to each other within the degrees of kinship set forth in NMSA 1978 § 40-1-7.

GENERAL ALLEGATIONS

New Mexico's Historical Discrimination Against Lesbian and Gay People

49. Each Plaintiff identifies as a lesbian, gay or bisexual. Lesbian, gay and bisexual people, including Plaintiffs, are members of a minority group that historically has been discriminated against in New Mexico and subjected to unequal treatment by the law and society solely because of their sexual orientation—a factor which bears no connection to the ability of the individual to lead a productive life or to contribute to society. Despite recent progress in eliminating anti-gay discrimination, lesbian, gay, and bisexual people remain a politically disadvantaged minority group.

50. For example, until 1975 New Mexico criminalized consensual sexual intimacy between persons of the same sex. Numerous convictions were upheld by the courts of this state, which repeatedly rejected the arguments of criminal defendants that the statute violated their constitutional rights by subjecting them to punishment solely for private, consensual intimate conduct. *See State v. Elliott*, 89 N.M. 305, 551 P.2d 1352 (1976) and numerous cases cited therein. By criminalizing for many decades the most private and intimate aspects of lesbian, gay

and bisexual people's lives, the State marked them as outcasts and invited public and private discrimination in all aspects of their lives.

51. New Mexico also lacked any state laws protecting lesbian, gay and bisexual people against discrimination until 2003. These protections were enacted only after advocates had fought for more than a decade to secure passage of antidiscrimination legislation. Bills prohibiting sexual orientation discrimination were introduced and ultimately defeated by opponents in 1991, 1993, 1997, 1999, and 2001. *See* S.B. 91 (1991); N.M. H.B. (1993); H.B. 277 (N.M. 1999). H.B. 360 (N.M. 2001). For decades prior to the 2003 legislation, lesbian, gay and bisexual people had no legal recourse if they were fired from a job, denied an apartment, or refused service by a business. Moreover, while state law now provides some recourse, even after antidiscrimination legislation was enacted, lesbian, gay and bisexual people continued to face discrimination in employment, public accommodations and other areas, including state employees who faced adverse employment actions on the basis of their sexual orientation. *See* Williams Institute, New Mexico—Sexual Orientation and Gender Identity Law and Documentation of Discrimination (Sept. 2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/NewMexico.pdf>.

52. Lesbian, gay and bisexual people in New Mexico likewise have been unable to secure legislation that would provide legal recognition to their relationships. Bills to establish domestic partnerships for same-sex couples were defeated in 2005, 2007, 2008, 2009, and 2010, in many cases without ever having been brought to a floor vote in the Senate. In short, lesbian, gay and bisexual New Mexicans have long faced discrimination at the hands of the State, and have remained unable to end this state-sanctioned discrimination through the political process.

The Harms of New Mexico's Exclusion of Same-Sex Couples from Marriage

53. Plaintiffs and their families are harmed in numerous ways by the exclusion of same-sex couples from the freedom to marry in New Mexico.

54. Marriage plays a unique and central social, legal, and economic role in American society. Being married reflects the commitment that a couple makes to one another, as well as representing a public acknowledgement of the value, legitimacy, depth, and permanence of the married couple's private relationship. Marriage is also the sole legal institution in New Mexico through which couples can create a family unit that the state recognizes and protects.

55. Conversely, denial to some couples of the status of being married in the eyes of the State conveys the State's view that the couple's private relationship is of lesser value and unworthy of legal recognition and support. This public rejection of the Plaintiffs' most significant relationship damages them and their children, invites and facilitates private discrimination against them, and promotes the view that their relationships and families are inferior to those of other committed couples.

56. New Mexico's refusal to permit Plaintiffs to marry also deprives them of hundreds of protections, benefits, and obligations of marriage that the federal government now provides to married same-sex couples in light of the United States Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013). In *Windsor*, the Court held that it is unconstitutional for the federal government to grant benefits to different-sex married couples and deny those benefits to same-sex married couples. While the Supreme Court made clear that marriage is about more than tangible benefits, it also noted that same-sex couples were denied numerous rights and protections under federal law, including denial of equal treatment with respect to "Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits." *Windsor*, 133 S. Ct. at 2694. Couples who are unable to marry are prevented under federal law

from, for example, (1) obtaining government healthcare benefits, (2) accessing Bankruptcy Code protections for domestic-support obligations, (3) filing joint tax returns, (4) being buried together in veterans' cemeteries, and (5) accessing certain protections under the federal penal code. *See id.* If Plaintiffs could marry in New Mexico, they could immediately obtain all the federal benefits to which *Windsor* holds married same-sex couples are entitled. By refusing to allow Plaintiffs to marry, Defendants have deprived them of these important protections.

57. The State also provides a broad array of statutory protections, benefits, and mutual responsibilities for couples electing to be married pursuant to NMSA 1978 § 40-1-1. The exclusion of same-sex couples from the right to marry in New Mexico causes Plaintiffs numerous tangible harms, as Plaintiffs are denied the public and private safety net that attaches to marriage. The harms to Plaintiffs from the State's marriage discrimination include the following, among others:

a) Plaintiffs are denied protections afforded married couples upon the death of a spouse, such as intestacy rights permitting the surviving spouse to inherit automatically from the deceased spouse's estate; the ability of the surviving spouse to elect a minimum percentage of the deceased's estate based on the length of the marriage even if there is a will; the right of the surviving spouse to family and personal property allowances; the right of the surviving spouse to file a wrongful death lawsuit when a spouse is killed; and presumptions benefiting spouses in the absence of a designated beneficiary for death and disability benefits and life insurance policies.

b) Plaintiffs are denied protections afforded employee spouses to file for or receive workers' compensation death benefits, even though as employees, they pay insurance premiums for workers' compensation benefits intended to provide protections

to employees and their dependents if the employee is injured or killed on the job, and may pay precisely the same taxes and insurance premiums as their co-workers.

c) Plaintiffs are denied the financial safety net provided to spouses under numerous tax laws, including the right to file jointly to reduce tax liability and tax benefits related to the ownership of real or personal property.

d) Plaintiffs may be denied the full benefit of community property protections that apply if spouses separate or divorce, as well as the laws that determine custody, visitation, support and other matters.

e) Plaintiffs are denied the automatic right to make health care decisions for a spouse when the spouse cannot, including the right to withhold or withdraw life-sustaining procedures and the right to donate a spouse's organs and tissues, and Plaintiffs are denied the right afforded to spouses to have priority over all others to become the court-appointed guardian for a spouse who becomes mentally incompetent.

f) Plaintiffs are denied the automatic right to make burial decisions and other decisions concerning the disposition and handling of remains of deceased spouses.

g) Many private entities in defining family members who are eligible for valuable benefits do so by reference to the State's statutory scheme, which provides relationship and family protections and obligations for different-sex couples who marry but not for similarly-situated same-sex couples. As a result, solely because they are in same-sex relationships, Plaintiffs may be excluded from other important family protections and obligations, such as employer-provided health insurance for family members.

58. As a result of Defendants' actions, Plaintiffs have been denied both the intangible and tangible benefits of being married under New Mexico law.

Excluding Same-Sex Couples from Marriage Violates the New Mexico Constitution

59. The Constitution of New Mexico requires the State to provide every person with due process and equal protection of the laws. N.M. Const., Art. II, §18. This requirement is independent of, and may provide more protection than, the limitations placed on the powers of states in the Fourteenth Amendment to the United States Constitution. Breen v. Carlsbad Municipal Schools, 2005-NMSC-028, ¶ 14, 138 N.M. 331.

60. There is no federal law analog to the State's marriage licensing statutes. The Congress of the United States is neither empowered to pass marriage licensing statutes nor to establish a state's requirements for the issuance of marriage licenses by that state.

61. The Constitution of New Mexico provides that "all persons are born . . . with certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty . . . and of seeking and obtaining safety and happiness." N.M. Const., Art. II, § 4. This guarantee is independent of the United States Constitution. The United States Constitution contains no specific guarantee of the right to seek safety and happiness analogous to Article II, § 4 of the New Mexico Constitution.

62. The Constitution of New Mexico contains what is commonly called an "equal rights amendment" which states that "[e]quality of rights under law shall not be denied on account of the sex of any person." N.M. Const., Art. II, § 18. Although the United States Constitution's equal protection provisions have been construed to limit the extent to which federal and state governments can discriminate on the basis of sex, that Constitution contains no analog to the New Mexico equal rights amendment.

63. New Mexico public policy is found in the Constitution, statutes, court decisions and rules of the state. That public policy makes manifest that, in New Mexico, the law may not

discriminate against persons on the basis of their sexual orientation. Without limitation, that public policy provides as follows:

- a) The Human Rights Act, NMSA 1978 § 28-1-1 et seq. makes it unlawful for any person, employer (with more than 15 employees), employment agency, labor organization, lender or credit entity, or public accommodation to discriminate in the provision of their respective services or benefits on the basis of sexual orientation.
- b) Law enforcement officers may not profile or alter their investigatory behavior on the basis of sexual orientation. NMSA 1978 § 29-1-2.
- c) The law provides additional and enhanced penalties for those who commit crimes motivated by prejudice against, among other things, the victim's sexual orientation. NMSA 1978 § 31-18(B) 2 and 3 (2007).
- d) Notaries public may not refuse to perform their services on the basis of sexual orientation. NMSA 1978 § 14-12A-8 (2003).
- e) The Code of Judicial Conduct forbids judges from manifesting in any way a bias against persons on the basis of sexual orientation. Rule 21-300(B), NMRA 2012.
- f) No profession, business, or public office licensed or maintained by the State of New Mexico is unavailable to persons because of their sexual orientation.
- g) The Governor of New Mexico issued an executive order requiring that the health care and other benefits for spouses of public employees be provided to the same-sex partners of public employees. N.M. Exec. Order No. 2003-010 (Apr. 9, 2003), available at <http://cdm16256.contentdm.oclc.org/cdm/singleitem/collection/p267801coll5/id/2652/rec/3>.
- h) Individuals who are part of same-sex couples are permitted by law to adopt children, including the children of their partner. NMSA 1978 §32A-5-11.

i) New Mexico courts have ruled that New Mexico law does not permit the State to refuse to let a family member take custody of a child from foster care because of the sexual orientation of the family member. State ex rel. Human Services Dept., 107 N.M. 769, 772, 764 P.2d 1327, 1330 (Ct. App. 1988).

j) A partner may seek a declaration that she is a legal parent of a child she has been raising together with a same-sex partner, based on her having held out the child as her own, even if she has not adopted the child. Chatterjee v. King, 2012-NMSC-019, 280 P.3d 283.

COUNT I
(Denial of Equal Protection of the Laws/Sexual Orientation)

64. Plaintiffs repeat and incorporate by reference all of the above allegations of this Second Amended Complaint as though fully set forth herein.

65. Article II, section 18 of New Mexico's Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws."

66. Defendants' refusal to provide Plaintiffs with applications for marriage licenses, to issue marriage licenses to Plaintiffs, and to permit the Plaintiff couples to marry one another discriminates against them on the basis of sexual orientation in violation of the Equal Protection Clause of the New Mexico Constitution.

67. Defendants' actions bear no rational relationship to any legitimate state interest, nor do they sufficiently advance any important or compelling state interest.

68. As a result of Defendants' actions, Plaintiffs have been deprived of the many legal rights, benefits, obligations and protections, as well as the intangible benefits, afforded to married couples under the laws of New Mexico.

69. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief as requested in this Second Amended Complaint.

COUNT II
(Denial of Equal Rights on Account of Sex)

70. Plaintiffs repeat and incorporate by reference all of the above allegations of this Second Amended Complaint as though fully set forth herein.

71. Article II, section 18 of the New Mexico Constitution contains an Equal Rights Amendment, which provides that “[e]quality of rights under law shall not be denied on account of the sex of any person.”

72. Defendants’ refusal to provide Plaintiffs with applications for marriage licenses, to issue marriage licenses to Plaintiffs, and to permit the Plaintiff couples to marry one another discriminates against them on the basis of sex, in violation of the Equal Rights Amendment.

73. As a result of Defendants’ actions, Plaintiffs have been deprived of the many legal rights, benefits, obligations and protections, as well as the intangible benefits, afforded to married couples under the laws of New Mexico.

74. Defendants’ actions bear no rational relationship to any legitimate state interest, nor do they sufficiently advance any important or compelling state interest.

75. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief against Defendants as requested in this Second Amended Complaint.

COUNT III
(Denial of Due Process of Law)

76. Plaintiffs repeat and incorporate by reference all of the above allegations of this First Amended Complaint as though fully set forth herein.

77. Article II, section 18 of New Mexico's Constitution provides "[n]o person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws."

78. Defendants' refusal to provide Plaintiffs with applications for marriage licenses, to issue marriage licenses to Plaintiffs, and to permit the Plaintiff couples to marry one another violates their rights to marry, to privacy, to freedom of intimate association, and to other fundamental liberties in violation of the Due Process Clause of the New Mexico Constitution.

79. Defendants have no sufficient justification for abridging Plaintiffs' due process rights.

80. As a result of Defendants' actions, Plaintiffs have been deprived of the many legal rights, benefits, obligations and protections, as well as the intangible benefits, afforded to married couples under the laws of New Mexico.

81. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief against Defendants as requested in this First Amended Complaint.

COUNT IV
(Denial of Inherent and Inalienable Rights)

82. Plaintiffs repeat and incorporate by reference all of the above allegations of this First Amended Complaint as though fully set forth herein.

83. Article II, section 4 of New Mexico's Constitution provides that "all persons are born . . . with certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty . . . and of seeking and obtaining safety and happiness."

84. Defendants' refusal to provide Plaintiffs with applications for marriage licenses, to issue marriage licenses to Plaintiffs, and to permit the Plaintiff couples to marry one another

deprives Plaintiffs of the inherent and inalienable right to, inter alia, seek safety and happiness in violation of the New Mexico Constitution.

85. Defendants' actions bear no rational relationship to any legitimate state interest, nor do they sufficiently advance any important or compelling state interest.

86. As a result of Defendants' actions, Plaintiffs have been deprived of the many legal rights, benefits, obligations and protections, as well as the intangible benefits, afforded to married couples under the laws of New Mexico.

87. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief against Defendants as requested in this First Amended Complaint.

WHEREFORE, on each and every count of this Second Amended Complaint, Plaintiffs request that the Court enter judgment in their favor and against Defendants and award Plaintiffs:

a) A declaration that NMSA 1978, Chapter 40, Article I, and any other New Mexico statute that excludes otherwise qualified same-sex couples from the right to obtain marriage licenses or to marry in New Mexico, is void and unenforceable because it violates the Constitution of New Mexico;

b) A declaration that NMSA 1978, Chapter 40, Article 1, and any other New Mexico statute that excludes otherwise qualified same-sex couples from obtaining all of the rights, privileges, benefits, protections, and obligations available to married couples under New Mexico law, is void and unenforceable because it violates the Constitution of New Mexico;

c) A permanent injunction forbidding Defendants, their agents, employees, representatives, and all those acting in concert with them from (i) enforcing the provisions of NMSA 1978, Chapter 40, Article I, in a manner that prevents same-sex couples from marrying; (ii) failing to prescribe and furnish forms for the application for

license to marry, the license to marry, and the marriage certificate that do not discriminate on the basis of sex or sexual orientation; and (iii) failing to implement and enforce NMSA 1978, Chapter 40, Article 1, without discriminating on the basis of sex or sexual orientation;

d) A permanent injunction requiring Defendants, their agents, employees, representatives, and all those acting in concert with them to execute and enforce the provisions of NMSA 1978, Chapter 40, Article I without regard to the sex or sexual orientation of the persons who seek enforcement or application of those statutes;

d) A permanent injunction requiring Defendants, once Plaintiffs have been married in conformance with the licenses issued by the Clerks, to treat Plaintiffs equally with all other married couples under the Constitution and laws of New Mexico.

e) Costs of suit, including but not limited to attorneys' fees; and,

f) Such further relief as the Court deems proper and the law allows.

Respectfully submitted,

SUTIN, THAYER & BROWNE
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We hereby certify that on August 16, 2013, we mailed a copy of this Second Amended Complaint to:

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